

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



January 2, 2002

H-2

1/9/02

TO: PARTIES OF RECORD IN APPLICATION 00-10-012 ET AL.

This is the draft decision of Commissioner Richard Bilas. It will be on the Commission's agenda at the meeting on January 9, 2002. The Commission may act then, or it may postpone action until later.

When the Commission acts on the draft decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Pursuant to Rule 77.7(f)(9), comments on the draft decision must be filed within five days of its mailing and no reply comments will be accepted.

Parties to the proceeding may file comments on the draft decision as provided in Article 19 of the Commission's "Rules of Practice and Procedure." These rules are accessible on the Commission's website at <http://www.cpuc.ca.gov>. In addition to service by mail, parties should send comments in electronic form to those appearances and the state service list that provided an electronic mail address to the Commission, including ALJ Rosenthal at shl@cpuc.ca.gov. Finally, comments must be served separately on the Assigned Commissioner, and for that purpose I suggest hand delivery, overnight mail, or other expeditious methods of service.

/s/ LYNN T. CAREW

Lynn T. Carew, Chief
Administrative Law Judge

LTC:tcg

Attachment

Decision **DRAFT DECISION OF COMMISSIONER BILAS** (Mailed 1/2/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the Los Angeles to Pasadena Metro Blue Line Construction Authority for an order authorizing the construction of two light rail transit tracks at-grade crossing West Avenue 45 in the City and County of Los Angeles, California.

Application 00-10-012
(Filed October 11, 2000)

And Related Matters.

Application 01-06-011
Application 00-11-050
Application 00-11-040
Application 00-11-034
Application 00-11-033
Application 00-11-032
Application 00-11-029
Application 00-11-016
Application 00-11-015
Application 00-10-050
Application 00-10-039
Application 00-10-033
Application 00-10-020

**DECISION AFFIRMING ASSIGNED COMMISSIONER'S
RULING AND REQUIRING ADDITIONAL EVIDENCE**

Summary

This decision will affirm the Commissioner Bilas' Assigned Commissioner's Ruling (ACR) dated November 1, 2001, which granted conditioned interim authority for the applicant to begin construction of a number of grade crossings prior to a final commission decision.

In considering whether to affirm or overrule the ACR, we will:

1. Describe the Project and the Applicant
2. Briefly describe the motion for interim authority and the opposition to the motion
3. Briefly describe the Assigned Commissioner' Ruling and various motions for reconsideration.
4. Discuss why we affirm the Commission's Ruling.

Description of the Project

Los Angeles to Pasadena Metro Blue Line (Line) will run approximately 13.6 miles from Los Angeles to Pasadena, and will be similar to the Los Angeles to Long Beach Blue Line, which has been in operation since 1990. The Line will begin at LAUPT, which is the largest train station in Southern California, serving Amtrak inter-city trains, Metrolink commuter trains, and the Red Line subway. From LAUPT it will run on aerial construction on exclusive right-of-way northward along Vignes Street and across intervening streets to a location north of College Street and east of Broadway. The Line will transition from aerial structure to ground level and continue northward on exclusive right-of-way to the approach of a new reinforced concrete bridge constructed across the Los Angeles River and the railroads that exist on its west and east banks in accordance with Decision (D.) 95-02-030 dated February 8, 1995 (A.94-08-034) and D.95-01-043 dated January 24, 1995 (A.94-08-051). The Line will continue on exclusive right-of-way across the new bridge and northward along the former right-of-way of The Atchison Topeka and Santa Fe Railway Company's (AT&SF)

Pasadena Subdivision, now owned by the Authority, to Avenue 33 in Los Angeles. Then it will continue northward on approximately 1.9 miles of semi-exclusive right-of-way in the City of Los Angeles. It will transition to street-running alignment along Marmion Way for approximately one half mile in the City of Los Angeles, then continue on approximately 4.2 miles of semi-exclusive right-of-way in the cities of Los Angeles and South Pasadena to across Del Mar Boulevard in the City of Pasadena. Included in this segment is the Arroyo Seco Bridge across State Route 110, subject of D.95-09-067 dated September 7, 1995 (A.94-11-027). The Line will continue northward on exclusive right-of-way for approximately 5 miles to the median of the I-210 Freeway and eastward within the median to the eastern boundary of the City of Pasadena.

Applicant

The Los Angeles County Metropolitan Transportation Authority (MTA) was created by the legislature pursuant to Pub. Util. Code § 130050.2 to be the successor agency to the Southern California Rapid Transit District (SCRTD) and the Los Angeles County Transportation Commission (LACTC), which ceased to exist as of April 1, 1993.

The Los Angeles to Pasadena Metro Blue Line Construction Authority (Authority) was created by the legislature pursuant to Section 132400 et seq. of the Pub. Util. Code to award and oversee all design and construction contracts for the completion of the Los Angeles to Pasadena Metro Blue Line Light Rail Project. Pursuant to §§ 132425 and 132430 of the Pub. Util. Code, MTA has transferred to the Authority all real and personal property, and other assets, as well as unencumbered balance of all local funds accumulated for completion of the project. Upon completion of the Line it will be deeded to MTA for operation and maintenance.

Motion for Interim Authority to Construct

The Authority requests interim authorization to proceed with construction of the project including construction of tracks across various public roads, highways, or streets, either grade separated or at-grade as the case may be, as proposed in each of the applications. The interim authorization would be entirely at the Authority's risk and would be effective only until the Commission reaches its final decision. The interim authorization would be subject to the following express conditions:

- “That in its testimony and pleadings in support of each of the above-captioned applications, the Authority shall not rely on any expenditures or commitments made pursuant to such interim authorization as support for the relief requested by those applications or in opposition to any protests against them;”
- “That in deciding the merits of each of the above-captioned applications, the Commission should be expected to give no consideration whatsoever to any expenses or other burdens incurred by the Authority in constructing facilities pursuant to such interim authorization;”
- “That the Authority shall not operate and shall not permit any other entity to operate any light rail vehicles upon any tracks constructed across any public road, highway, or street at grade unless and until the Commission has granted any permanent authorization required for such at grade crossings; “
- “That the Authority shall comply fully with any and all commitments, mitigation measures, and conditions previously accepted or imposed in connection with its construction plans;”
- “Any further conditions the Commission finds necessary to ensure that the Authority gains no advantage from the interim authorization requested other than the ability to construct the Project, as proposed, more promptly and efficiently, but entirely at its own risk.”

The applicant makes five arguments in support of the grant of interim relief:

A. The Authority Has Been Given a Legislative Mandate to Build the Project Within Budget and on Time.

SB 1847 (1998 Stats., c. 1021), which was signed by the Governor September 30, 1998, requires the Authority, under the supervision of the California Transportation Commission (“CTC”), to comply with the design and construction timetable imposed for the Project under the 1998 State Transportation Improvement Program (“STIP”), which essentially requires the Project to be complete by 2003.

B. The Authority Adopted and the CTC Approved a Design/Build Approach for the Project in Order to Control Costs and to Meet a Demanding Project Completion Schedule.

The Financial Plan and Project Management Plan (PMP), which delineated a design/build implementation program, were formally approved by the CTC in November 1999, as part of CTC Meeting Resolution MFP-99-13 that provided the Authority its initial \$83.2 million state funding allocation. The Authority has entered into construction contracts whereby any changes to the contractor’s schedule will result in additional compensation to be paid to the contractor. The Authority asserts that there is no additional funding available to pay for the increased compensation.

C. Inability to Install Track Across Public Roads, Highways and Streets Will Cause Unnecessary and Unbudgeted Costs to the Project and May Affect the Authority’s Ability to Complete the Project Even If the Protestants’ Challenges Ultimately Fail.

Once the contractor’s linear work along the course of the Project reaches intersections where grade crossings are proposed for construction, which will

occur by the end of October, 2001, the Authority will begin to incur unnecessary and unbudgeted costs by up to \$14 million, based on the procedural schedule set forth in the recent Scoping Memo and Ruling of Assigned Commissioner Bilas. These incremental costs will impair the Authority's ability to complete the Project within the budget and schedule limitations noted above. Cost overruns of this magnitude will bring the viability of the Project into question.

D. Interim Authorization to Install Track at Protested Crossings Entirely at the Authority's Risk Will Permit the Authority to Avoid Unnecessary and Unbudgeted Additional Costs.

The Authority considers it reasonable for it to incur the already budgeted and contracted costs as the price of avoiding a looming cost overrun that could quickly rise to the level of \$14 million.

E. The Proposed Conditions Upon the Requested Interim Authorization Ensure That the Authority Will Bear All Risks Associated With the Granting of Such Interim Relief and That No Safety Concerns Are Presented.

One of the proposed conditions provides that the Authority will not rely on any expenditure made pursuant to such interim authorization as support for more permanent authorization.

Another of the proposed conditions commits the Authority not to operate any light rail vehicles across any grade crossings that have not been permanently authorized. In addition, any movement of construction vehicles will be subject to the jurisdiction of the responsible local authorities.

Opposition to the Motion

The Motion for Interim Authority to Construct was opposed by Citizens Against the Blue Line At Grade (NOBLAG), the Rail Crossing Engineering Section of the California Public Utilities Commission staff (RCSE), Mt.

Washington Association and Ms. Jo Anne Barker (collectively Protestants) on among others the following basis:

A. The Requested Relief is disfavored under The California Environmental Quality Act (CEQA) and the CEQA Guidelines.

Here the primary argument is that it is unclear that CEQA allows for such an option as interim authority to construct in the present circumstances. Also, CEQA does not endorse any action that would foreclose the consideration of alternatives or other mitigation measures.

B. The Requested Relief Would Place an Inappropriate and Unnecessary Burden on Commission Decision-Makers

The argument is that once the Commission has authorized construction and the project is built it would be extremely difficult for the Commission to later order that construction be “un-done” at great cost of public monies.

C. The Requested Relief Will Unduly Prejudice the Protestants.

In many cases the Authority is requesting the ability to construct crossings at grade rather than separated crossings. The Authority also argues that it is precluded from considering grade-separated crossings because of budget constraints. Protestants argues therefore, that once the limited funds have been expended it will have very little chance of convincing the Commission to consider other important factors such as public health and safety which might require an order to un-do the construction and replace it with a separated crossing.

Protestants also point out that the Authority has not shown that it has the financial ability to un-do construction, remediate construction sites and implement other mitigation measures.

**D. The Requested Relief Should Not Be Granted
Because the Authority Created this Delay by not
Timely Filing its Applications with the Commission.**

The Protestants point out that the Authority could have filed its applications much earlier to allow the Commission time to properly consider each application. Instead by not filing sufficiently early, the Authority has brought on the possibility of cost over-runs upon itself. Such failure to file timely should not preclude the public's participation in the process nor impinge on the commission's ability to adequately consider the matters.

The RSCE staff also opposed the motion based on the fact that the Applicant has not agreed to all the safety measures proposed by RCSE staff. One such measure is constructing at least one of the crossings in question as a grade separated crossing. The RCSE staff also cautions the Commission to be aware of the important precedent it might create in granting the motion. The precedent may encourage others to build first and ask for approval later. This type of activity could cause serious issues for public safety.

The Assigned Commissioner's Ruling Granting the Motion

The assigned Commissioner issued a ruling on November 1, 2001, granting the motion. The Ruling was based upon several considerations:

1. Applicant alleges severe potential cost overruns caused by the time necessary to secure regulatory approval;
2. Applicant is willing to accept numerous conditions, including the cost of undoing any construction required by further order of this Commission; and
3. There would be no environmental consequences because no trains would be allowed to operate until the Commission has issued a final order in the proceeding.

The Assigned Commissioner's Ruling provided that:

- "1. Applicant may construct its light rail line in accordance with the Applications consolidated in this proceeding.

“2. In accepting this Ruling Applicant agrees not to argue or allude to any costs of remedial work attributable to construction performed under authority of this Ruling in any brief, pleading, oral argument, or *ex parte* meeting with the Commission, any Commissioners, or employee of the Commission.

“3. Applicant accepts this authority with full knowledge that one or more of the Protestants may be successful in the final Commission decision. Should this occur Applicant acknowledges it will be required to undo any construction contrary to the Commission decision. Cost of this remedial action may well exceed the cost Applicant now claims is at risk if it is not permitted to continue construction.

“4. Applicant shall give notice of its intentions with regard to this Ruling within 15 days of the date of the Ruling. All parties shall be served with this notice by Applicant.”

This Ruling by the Assigned Commissioner would become the final order of the commission after the Ruling is approved or confirmed by the Commission as provided by Pub Util Code § 310 shown below

"Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the commission and ordered filed in its office, is the finding, opinion, and order of the commission."

Ruling Contested

NOBALG, RCSE staff, Mt. Washington Association, and Jo Anne Barker have contested the Ruling. In summary the Protestants recommend that the interim authority to construct granted by the Ruling be held in abeyance until:

1. The costs and inconvenience to the neighborhood and the public of removing or modifying the safety protections at the crossings, including grade separations are minimal.

2. The Authority has demonstrated the actual costs of delay necessitating interim relief.
3. The Authority is likely to be successful on the merits with respect to their recommended safety protections at the crossings.
4. The Authority has obtained a bond sufficient to cover all costs removing or modifying the grade crossings.
5. The Authority has complied with all relevant provisions of CEQA.

Ruling Affirmed

We will affirm the Ruling of Assigned Commissioner Bilas dated November 1, 2001. We have considered the arguments against granting the motion and the arguments requesting reconsideration of the motion and elect to affirm the Ruling.

We agree that there is sufficient chance that meeting the current schedule for the proceedings will result in significant cost overruns with the possibility of preventing completion of the project. Also, the impositions of the conditions will prevent the Protestants from suffering any prejudice to their respective positions in this proceeding. Finally, with one additional condition, we agree that there will be no significant effects on the environment until a final order is issued in this proceeding because there will be no rail operations until the final order is issued.

An additional condition needed to ensure no negative environmental impacts is that there should be condition that requires we order signage that says the lines are not in operation.

Comments on Draft Decision

The draft decision was mailed on January 2, 2002, with comments due January 7, 2002. Pursuant to Rule 77.7(f)(9) of our Rules of Practice and Procedure, we reduce the 30-day period for public review and comment because

public necessity requires that we act on this matter prior to the 30-day period.

No reply comments are required.

Findings of Fact

1. Assigned Commissioner Bilas issued a Ruling on November 1, 2001, granting the Motion for interim authority to construct the project pending a final order by the Commission.

2. The current schedule in this proceeding may result in delays to the project.

3. Delays to the project may result in significant additional costs of the project.

4. Applicant has proposed several conditions to the granting of interim authority.

5. The conditions proposed by the Applicant will protect the protestants from any possible prejudice to their positions in this proceeding.

6. There will be no train operations until the Commission issues a final order in this proceeding.

7. Signage that is posted and makes clear that the rail lines are not in operation will help ease traffic congestion.

8. There will be no significant effect to the environment until the Commission has issued a final order in this proceeding.

Conclusions of Law

1. The Ruling of the Assigned Commissioner issued on November 1, 2001, should be affirmed.

2. The conditions proposed and augmented herein by applicant should be added as conditions to the Ruling.

O R D E R

IT IS ORDERED that:

1. The Ruling of the Assigned Commissioner granting interim authority to construct the project issued on November 1, 2001, should be affirmed.
2. The authority to construct is subject to the following conditions:
 - a. That in its testimony and pleadings in support of each of the above-captioned applications, the Authority shall not rely on any expenditures or commitments made pursuant to such interim authorization as support for the relief requested by those applications or in opposition to any protests against them;
 - b. That in deciding the merits of each of the above-captioned applications, the Commission should be expected to give no consideration whatsoever to any expenses or other burdens incurred by the Authority in constructing facilities pursuant to such interim authorization;
 - c. That the Authority shall not operate and shall not permit any other entity to operate any light rail vehicles upon any tracks constructed across any public road, highway, or street at grade unless and until the Commission has granted any permanent authorization required for such at grade crossings;
 - d. That the Authority shall comply fully with any and all commitments, mitigation measures, and conditions previously accepted or imposed in connection with its construction plans; and
 - e. Applicant shall post signage that the lines are not in operation.

This order is effective today.

Dated _____, at San Francisco, California.